

ROSE LEDBETTER)
 Claimant)
 VS.)
)
CONSTAR PLASTICS)
 Respondent)
 AND)
)
CIGNA PROPERTY & CASUALTY)
 Insurance Carrier)

Docket No. 205,252

After reviewing the file and the briefs of the parties, the Appeals Board finds that the Order of the Administrative Law Judge should be reversed.

The Administrative Law Judge exceeded his jurisdiction by awarding temporary partial disability benefits to a claimant suffering from a scheduled injury pursuant to K.S.A. 44-501d. Accordingly, the Appeals Board has jurisdiction to review this preliminary hearing Order pursuant to K.S.A. 44-534a, as amended, and K.S.A. 44-551(b)(2)(A), as amended, which states in pertinent part:

“If an administrative law judge has entered a preliminary award under K.S.A. 44-534a and amendments thereto, a review by the board shall not be conducted under this section unless it is alleged that the administrative law judge exceeded the administrative law judge’s jurisdiction in granting or denying the relief requested at the preliminary hearing.”

Claimant contends the Administrative Law Judge did not exceed his jurisdiction in ordering temporary partial disability compensation at a preliminary hearing, citing the Appeals Board’s decision in Brown v. Lawrence-Douglas County Board of Health, Docket No. 205,848, opinion filed March 29, 1996. In that case, the Appeals Board held that temporary partial disability compensation can be awarded in a preliminary hearing on a claim for whole body disability pursuant to K.S.A. 44-510e(a).

Respondent distinguishes the Appeals Board’s decision in Brown in that case dealt with the body as a whole disability and not a scheduled injury. In this case, claimant’s injury is to his right shoulder. K.S.A. 44-510d(a)(13) includes in the “schedule” any disability to the “shoulder joint, shoulder girdle, shoulder musculature or any other shoulder structures” Subsection (b) of that same statute goes on to state:

“Whenever the employee is entitled to compensation for a specific injury under the foregoing schedule, the same **shall be exclusive** of all other compensation except the benefits provided in K.S.A. 44-510 and amendments thereto, **and no additional compensation shall** be allowable or payable for any temporary or permanent, partial or total disability” (Emphasis added.)

Respondent contends that K.S.A. 44-510d makes it clear that temporary partial disability is not to be awarded in scheduled injury cases. The Appeals Board agrees. This position is further supported by the language in K.S.A. 44-510e that specifically provides for temporary partial disability only in cases of “temporary or permanent partial general disability not covered by such schedule.” K.S.A. 44-510e also contains the language or formula for calculating temporary partial disability. No such language appears in K.S.A. 44-510d, the “scheduled injury” statute.

Where a statute is clear and unambiguous, the court must give effect to the legislative intent expressed therein rather than make a determination of what the law should or should not be. In re Appeal of News Publishing Co., 12 Kan. App. 2d 328, 743

P.2d 559 (1987); *State Exhibit rel. Stephan v. Board of Seward County Comm'rs*, 254 Kan. 446, 866 P.2d 1024 (1994).

Claimant attempts to argue that a determination has yet to be made as to whether claimant's injury is to the shoulder as opposed to the body as a whole. However, the only evidence in the record is that claimant's injury was to his rotator cuff and that surgery was performed to repair same. It is claimant's burden to prove each and every element of his claim. K.S.A. 44-501(a). Claimant has not met that burden to establish that this is other than a claim for injury to claimant's shoulder only. Therefore, claimant's right to compensation is controlled by K.S.A. 44-510d. As such, claimant is not entitled to temporary partial disability compensation.

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the preliminary Order entered by Administrative Law Judge Alvin E. Witwer dated July 26, 1996, should be, and is hereby, reversed.

IT IS SO ORDERED.

Dated this ____ day of October 1996.

BOARD MEMBER

c: Philip Sedgwick, Kansas City, KS
J. Donald Lysaught, Jr., Kansas City, KS
Alvin E. Witwer, Administrative Law Judge
Philip S. Harness, Director